No. [illegible]

# Supreme Court of the United States

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## INDEX


| | Page |
|---|---|
| Statement | 1 |
| Reasons for Refusing Writ | 3 |
| Conclusion | 11 |

## CITATIONS

**Cases:** PAGE

Estate of Cremidas (D. Alaska 1953), 18 FR Serv. 60b.29, Case 3, 14 FRD 15 ..... 6

Klapprott v. United States (1949), 335 U. S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266 ..... 11

Radovich v. Nat. Football League, 352 U. S. 445 (1957) 2, 4, 5

Sebastiano v. United States (ND Ohio 1951), 103 F. (2d) 278, 15 FR Serv. 60b.29, Case 2 ..... 6

United States v. Backofen (CA 3d, 1949), 176 F. (2d) 263, 12 FR Serv. 60b.29, Case 2 ..... 6

Young v. Garrett, 159 F. (2d) 634 (8th Cir. 1947) ..3, 7, 8

Young v. Garrett, 5 FRD 117 (W.D. Ark. 1946) ....7, 8

**Other Authorities:**

6 Moore's Federal Practice ..... 10

7 Moore's Federal Practice ..... 6

No. 682

# Supreme Court of the United States

OCTOBER TERM, 1961

WESTERN AUTO SUPPLY COMPANY, PETITIONER,

*versus*

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE AND HARRY CLINK-SCALES, RESPONDENTS.

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

### STATEMENT

This suit was commenced under Section 3 of the Clayton Act (15 U.S.C. § 15) seeking treble damages for claimed violations of the antitrust laws of the United States. The original complaint was filed on June 3, 1957, and thereafter respondents voluntarily filed their first amended complaint (R. 22, 31-61; Appendix, infra, pp. A4-5). Petitioner moved to dismiss the first amended complaint

for failure to state a claim and on November 18, 1958, the District Court entered its order sustaining the petitioner's motion (R. 22; Appendix, infra, pp. A5, A26-39). Respondents appealed from that ruling to the court below. On July 16, 1959, the Fourth Circuit handed down its opinion stating (Appendix, infra, pp. A23-24):

> "The complaint has been once amended, and apparently there was no application for further amendment. Under the circumstances, we might appropriately affirm without affording the plaintiffs any additional opportunity to plead over. However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreemnt or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

At the conclusion of this opinion, the Court below stated (Appendix, infra, p. A25):

> "While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.
>
> "**Affirmed and remanded.**"

On September 1, 1959, respondents filed a motion "To Amend Complaint in Conformance with Opinion of the United States Court of Appeals for the Fourth Circuit" (R. 3) and appended thereto was their proposed second amended complaint (R. 3-22). Petitioner opposed the motion on the ground, *inter alia*, that the District Court was

without jurisdiction to entertain the motion because the final order of dismissal entered by the District Court on November 18, 1958, had never been vacated or modified and at no time had respondents applied to any court for an order vacating or modifying the order of dismissal. The District Court in its opinion and order dated April 11, 1960 (R. 22-31; Appendix, infra, pp. A4-14) stated that it was unnecessary for the Court to pass upon the jurisdiction question raised by the Petitioner because it was overruling the Motion for leave to Amend on the merits. Respondents appealed and on November 2, 1960, the court below filed a *per curiam* opinion reversing the District Court. Even though the Petitioner, in its brief and oral argument, pursued the question here raised, nevertheless, the Fourth Circuit summarily overruled the point, merely stating in this regard (R. 92-93; Appendix, infra, p. A2):

> "When this treble damage action for violation of the anti-trust law came here in an earlier appeal we remanded the case to afford the plaintiffs an opportunity to apply to the District Court for leave to amend their complaint. An amended complaint was submitted by the plaintiffs to that court together with an appropriate motion for leave to file the same."

Accordingly, judgment was entered on the same date remanding the case to the District Court for further proceedings in accordance with the opinion (R. 94; Appendix, infra, p. A1).

## REASONS FOR REFUSING WRIT

The Respondents, for reasons hereinafter stated, believe that there is no conflict between the decision of the court below and the decision of the Court of Appeals for the Eighth Circuit in *Young v. Garrett*, 159 F. (2d) 634 (1947). Further, respondents believe that petitioner's application for a writ of certiorari does not raise any question as to whether this Court should disturb the judgment of the

court below remanding the case to the District Court for further proceedings in accordance with its opinion.

1. The court below did not enter a judgment unconditionally affirming the original order of dismissal by the District Court; rather, that Court stated (Appendix, infra, p. A25):

> "While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.
>
> "Affirmed and remanded."

The reasons given by the Court of Appeals for the Fourth Circuit in making its affirmance conditioned upon the right of the respondents to file an Amended Complaint, were (Appendix, infra, p. A24):

> "However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreement or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

Apparently, the Fourth Circuit was impressed by the statements of respondents in their brief and in oral argument that petitioner had compelled franchised retailers to handle its full line of products. Yet, the Fourth Circuit found that respondents' complaint contained no clear-cut allegations that this was pursuant to a condition, agreement or understanding violative of the Clayton Act (Appendix, infra, p. A22). Since the respondents, in their

brief, repeatedly asserted that their complaint contained express and implied allegations sufficient to meet the requirements of the statute, the Fourth Circuit felt that it was in the interest of substantial justice to permit them to reformulate the complaint and state the requisite statutory conclusions in unequivocal terms (Appendix, infra, p. A24).

In other words, the Fourth Circuit, in its first opinion took the position that technically the District Court was correct in dismissing the Complaint but that it was obvious to the Fourth Circuit that substantive allegations contained in the Complaint were sufficient to state a cause of action providing the requisite allegations couched in the statutory language accompanied such substantive allegations. It was for this reason that the Fourth Circuit conditionally affirmed the District Court's rulings. As was stated by the Fourth Circuit in its opinion (Appendix, infra, A24):

> "This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

The petitioner is in error when it argues that the court below originally entered a judgment unconditionally affirming the original order of dismissal by the District Court.

2. In its *per curiam* opinion dated November 2, 1960, the Fourth Circuit Court of Appeals stated that respondants filed an **appropriate motion** for leave to file the amended complaint with the District Court (Appendix, infra, A2). (Emphasis added.)

When confronted with petitioner's contention, during oral argument, to the effect that respondents had never made application to the District Court pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, following

the conditional affirmance of the original order of dismissal by the Court of Appeals, for relief from that order, the Chief Judge of the court below, from the Bench, stated that it was not necessary for respondents to have done so since the Court of Appeals, by its order, specifically granted this right to the respondents to file an amended complaint in the District Court. Nevertheless, it was pointed out that even if it were necessary under the Federal Rules for respondents to first make application to the District Court pursuant to Rule 60 (b) for relief from the conditional affirmance of the original order of dismissal by the Court of Appeals, that the motion for leave to amend the complaint had the effect of seeking such relief.

This view, that the respondents' motion for leave to file the amended complaint in conformance with the opinion of the Fourth Circuit, should be treated as a motion to vacate the prior judgment under Rule 60 (b), although mislabelled, is sustained by all of the authorities.

In 7 Moore's Federal Practice, Section 60.27 (1), Page 299, it is stated:

> "Since nomenclature is important, the moving papers may be treated as a motion under 60 (b), although mislabelled."

In Footnote 32, sustaining this statement, there is to be found the following:

> "*In re Estate of Cremidas* (D Alaska 1953), 18 FR Serv 60b.29, Case 3, 14 FRD 15 (mislabelled petition for writ or *coram nobis*); *United States v. Backofen* (CA3d, 1949), 176 F2d 263, 12 FR Serv 60b.29, Case 2 (letter to district court treated as a motion to open and set aside default denaturalization judgment); see *Sebastiano v. United States* (ND Ohio 1951), 103 F2d 278, 15 FR Serv 60b.29, Case 2 (for purpose of ruling court treated an independent action as a motion for relief under 60 (b) (6), aff'd (CA6th, 1952), 195 F2d 182; and see 59.04 (7), 60.18 (8), supra; 60.28 (3), infra."

There can be no contention that the motion for leave to file the amended complaint was not timely made since the opinion of the court below was dated July 16, 1959 and the motion in the District Court was filed on September 1, 1959.

3. There is no conflict between the decision of the court below and the judgment of the Court of Appeals for the Eighth Circuit in *Young v. Garrett*, 159 F. (2d) 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young v. Garrett*, 5 F.R.D. 117 (1946).

When the decision in *Young v. Garrett, supra*, was handed down, Rule 60 (b) was entirely different from the present Rule 60 (b). This fact was overlooked by the District Court when it stated that there appears to be considerable merit in petitioner's contention that there was a conflict between the decision in *Young v. Garrett* and the ruling of the court below in the instant case.

Rule 60(b) was extensively revised in 1946 after the decision in *Young v. Garrett*. At the time of the *Young v. Garrett* decision, Rule 60 (b) was as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, USC, Title 28, § 118, a

judgment obtained against a defendant not actually personally notified."

Furthermore, the factual situation in *Young v. Garrett* is entirely different from that presented in the case at Bar.

In *Young v. Garrett*, on September 14, 1933, a judgment was entered by the District Court dismissing the Complaint. On appeal, the judgment of the District Court dismissing the complaint was affirmed by the Eighth Circuit on May 1, 1945. Thereafter, the Plaintiffs filed a petition for rehearing and on August 8, 1945, the Eighth Circuit denied the petition for rehearing but directed that the case be remanded to the District Court to permit the Plaintiffs to apply for leave to amend the complaint providing application be made not later than October 1, 1945. The Plaintiffs filed their motion for permission to amend on September 24, 1945.

The District Court in its opinion in 5 F.R.D. 117 (1946) on page 121 ruled that:

"The motions for leave to file the tendered amended and substituted complaints were filed more than two years after the judgments of dismissal were entered. * * * To permit an amendment now, it would be necessary for this court to modify the judgments appealed from and affirmed. This court does not have such power. Rule 60 (b), Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c."

On Page 121, the District Court further stated:

"Rule 60 (b) limits the time when a court may relieve a party or his legal representatives from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect to six months. 'The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken.'

"There were no reservations in the judgments rendered herein, and nothing remained for the court to do.

The cases were dismissed and costs were adjudged against plaintiffs, and the judgments were affirmed." (Emphasis added.)

In the case at Bar, on the contrary there were reservations in the judgments entered; namely, in the conditional order of the Fourth Circuit itself.

At the time of the decision in *Young v. Garrett*, as has been pointed out, Rule 60 (b) was very restrictive:

> "The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken."

In the case at Bar, the Order of the District Court dismissing the complaint was dated November 18, 1958 and the motion for leave to file the amended complaint in conformance with the opinion of the Fourth Circuit Court of Appeals was filed on September 1, 1959. As has already been pointed out, the motion for leave to file the amended complaint, even though mislabelled, should be treated as a motion to vacate the judgment as well as a motion for leave to amend the complaint.

As Rule 60 (b) now reads, the one year limitation on filing a motion to vacate a judgment in the District Court applies only to reasons 1, 2 and 3; under reason 6 of Rule 60 (b) any other reason justifying relief from the operation of the judgment, "there is no time limitation".

Even if it should be argued that respondents motion for leave to amend the complaint should not be treated as a motion for relief under Rule 60 (b) (6), it would still be proper and timely for respondents to now file such a motion if for any technical reason such should be necessary.

The respondents did not deem it necessary to specifically move to vacate the judgment entered by the District Court on November 18, 1958 at least until after the District Court had first given them permission to amend the com-

plaint, since there would be no basis upon which to premise such motion, if such motion were necessary at all in view of the Fourth Circuit's opinion. The respondents took the position that it was implicit in the order of the court below that there was no final disposition of the matter until after the motion for leave to file the amended complaint had been heard and disposed of and hence no final judgment to vacate.

The respondents understood the opinion of the Fourth Circuit to give them the right to file such motion without first having to apply to the District Court for relief of the judgment of that Court dated November 18, 1958 because the respondents did not understand the Fourth Circuit's affirmance to be an unconditional affirmance of the District Court's Order of November 18, 1958.

Nevertheless, as has been stated above, if the Fourth Circuit's Order of July 15, 1959 was in fact an unconditional affirmance of the District Court's Order, then under accepted authorities, this motion in the District Court dated September 1, 1959 for leave to amend the complaint should be construed as containing a motion to vacate the prior judgment of November 18, 1958. If this motion could not be so construed, then respondents respectfully submit that under the present wording of Rule 60 (b) (6) time has not run against the respondents to now make such a motion and that, as a matter of law the District Court must vacate the judgment in view of the Fourth Circuit's opinion dated November 2, 1960 which ruled that the amended complaint did state a cause of action under Section 3 of the Clayton Act.

In 6 Moore's Federal Practice, Section 60.03(2), Pages 4020-4021, it is stated:

> "In other words there is 'a reasonable time' limitation for the making of a motion on the basis of any of the six reasons; but there is no definitely prescribed

time limitation on a motion urging reasons (4), (5), and (6). There is, however, a maximum time limitation of one year on a motion urging reasons (1), (2), and (3); and amended Rule 6(b) states that this time period is not subject to enlargement."

As was stated by Mr. Justice Black in *Klapprott v. United States* (1949), 335 U. S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Regardless of the theory relied upon, it would seem that in the instant case, Rule 60(b) should be used as a shield and not a sword so that the respondents may be given their day in Court. Any other application of Rule 60(b)(6) to the case at Bar would not be appropriate to accomplish justice.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHESTER D. WARD, JR.,
Attorney for Respondents.